

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

ONEBEACON AMERICA INSURANCE  
COMPANY,

Plaintiff,

vs.

CIVIL ACTION

NO:

04 11753 JLT

BLUE WATER ENTERPRISES, INC.  
Defendant.

MAGISTRATE JUDGE *Bowler*

RECEIPT # \_\_\_\_\_  
AMOUNT \$ 150  
SUMMONS ISSUED 42  
LOCAL RULE 4.1 \_\_\_\_\_  
WAIVER FORM \_\_\_\_\_  
MCF ISSUED \_\_\_\_\_  
BY DPTY CLK. FO.M  
DATE 8/11/04

PLAINTIFF'S COMPLAINT FOR APPOINTMENT OF UMPIRE PURSUANT  
TO THE FEDERAL ARBITRATION ACT

Now comes the plaintiff, OneBeacon America Insurance Company, in the above-entitled action, by and through its undersigned attorneys, Clinton & Muzyka, P.C., and files its Complaint for Appointment of Umpire pursuant to the Federal Arbitration Act (9 U.S.C. §5).

PARTIES

1. The defendant, Blue Water Enterprises, Inc., is a domestic corporation with a principle place at 270 Old Ocean Street in Marshfield, Massachusetts.
2. The plaintiff, OneBeacon America Insurance Company, is a domestic corporation with a principle place of business at One Beacon Street in Boston, Massachusetts.

FACTS COMMON TO ALL COUNTS

3. At all material times herein, the defendant was the owner and operator of the F/V PRIM LADY, a commercial fishing vessel.
4. On or about July 3, 2002, the parties entered into a binding and enforceable insurance contract (Policy No: C5JH51317) consisting of Hull and Protection & Indemnity policies. The policy afforded coverage for the F/V PRIM LADY from July 3, 2002 through July 3, 2003.
5. The relevant portion of the Hull policy states:

"Warranted that in case of any casualty or loss which may result in a claim under this policy the assured shall give this Company prompt notice thereof and reasonable opportunity to be represented on a survey of the damage, each party to name a surveyor, which two surveyors shall proceed to draw specifications as to the extent of the damage and the work required to make the damage good. If the two surveyors agree, such specifications shall be binding on both this Company and the assured, subject nevertheless to policy terms and conditions and the question of whether or not the disaster and resulting loss or damage are covered by this policy. In the event the two surveyors cannot agree, they must select an umpire, and in the event they cannot agree upon an umpire, either party hereto may apply to the United States District Court for the district in which the home port of the vessel named herein is located for the appointment of an umpire, pursuant to the United States Arbitration Act. (emphasis added). A copy of the Hull coverage section is attached hereto as Exhibit "A."

6. On or about August 24, 2002, the F/V PRIM LADY was involved in a collision while fishing in Cape Cod Bay and sustained property damage. As a result of the collision, the defendant submitted a claim under the Hull policy.
7. After receiving notification of the loss, the plaintiff appointed David Wiggin as its surveyor to evaluate the nature and extent of the damage. The defendant subsequently engaged the services of Kevin Scanlon to evaluate the damage.
8. Based upon his surveyor, Mr. Wiggin determined that the vessel sustained approximately \$25,000.00 in damages. Mr. Wiggin, however, recommended that further repairs be performed in order to determine the presence of any hidden or undisclosed damages.
9. Based upon his surveyor, Mr. Scanlon concluded that the F/V PRIM LADY was a constructive total loss, as the repair costs would exceed the insured value of \$122,000.00.
10. Relying upon the terms of the insurance contract, on October 20, 2003 the plaintiff requested that a joint survey of the vessel be conducted. The purpose of requesting a joint survey was to enable the surveyors to discuss their respective findings. *A copy of the*

*plaintiff's October 20, 2003 correspondence is attached hereto as Exhibit "B."*

11. The defendant refused a joint survey and on October 29, 2003 advised the plaintiff that it selected an umpire to determine the nature and extent of damage. *A copy of the defendant's correspondence is attached hereto as Exhibit "C."*
12. The plaintiff responded to the defendant's October 29, 2003 correspondence by again requesting a joint survey. The plaintiff also advised that the defendant cannot unilaterally select an umpire. *A copy of the plaintiff's response to the defendant's October 29, 2003 correspondence is attached hereto as Exhibit "D."*
13. The defendant refused to consent to a joint survey and on February 11, 2004 instituted an action against OneBeacon America Insurance Company in Plymouth Superior Court (Docket No: 04-187) alleging violations of Chapter 93A.
14. After the aforementioned action was instituted, the parties entered into settlement negotiations for several months. On June 29, 2004, the defendant rejected the plaintiff's last settlement offer and negotiations terminated.

15. Since settlement negotiations terminated, the plaintiff requested the defendant's position in having the surveyors select a mutually acceptable umpire as required by the insurance contract or, in the alternative, applying to this Court for the appointment of an umpire. The defendant has not responded necessitating the filing of this action.

JURISDICTION

16. This Honorable Court has jurisdiction over this controversy pursuant to 28 U.S.C. §1333, as it involves a maritime contract of insurance.
17. This matter is controlled by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) as set forth in the controlling insurance contract.

COUNT I  
*(Appointment of Umpire)*

18. The plaintiff reaffirms and reiterates the allegations contained in Paragraphs Nos. 1 through 16 inclusive and incorporates same as if fully set out herein.
19. The insurance contract allows the parties to apply to the United States District Court for the district in which the home port of the vessel is located for the

appointment of an umpire pursuant to the Federal Arbitration Act.

20. The insurance contract is a binding and enforceable agreement voluntarily entered into by the parties.
21. The F/V PRIM LADY is located within the judicial district of the United States District Court for the District of Massachusetts.

**WHEREFORE**, the plaintiff, OneBeacon America Insurance Company, respectfully requests that this Honorable Court:

- (1) Appoint an umpire to determine the nature and extent of the damages sustained to the F/V PRIM LADY as a result of the August, 24, 2002 collision, and;
- (2) Issue an Order staying the action presently pending in the Plymouth Superior Court (Blue Water Enterprises, Inc v. OneBeacon America Insurance Company, Civil Action No: 04-187) pending the umpire's findings and further Order of this Court.

By its attorneys,

**CLINTON & MUZYKA, P.C.**



Thomas J. Muzyka  
BBO No: 365540  
Kenneth M. Chiarello  
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Suite 1400  
Boston, MA 02108  
(617) 723-9165

August 9, 2004

1. TITLE OF CASE (NAME OF FIRST PARTY ON EACH SIDE ONLY) OneBeacon America Insurance Company  
vs. Blue Water Enterprises, Inc.
2. CATEGORY IN WHICH THE CASE BELONGS BASED UPON THE NUMBERED NATURE OF SUIT CODE LISTED ON THE CIVIL COVER SHEET. (SEE LOCAL RULE 40.1(A)(1)).
- \_\_\_ I. 160, 410, 470, R.23, REGARDLESS OF NATURE OF SUIT.
- \_\_\_ II. 195, 362, 400, 440, 441-444, 540, 550, 555, 625, 710, 720, 730, 740, 790, 791, 820\*, 830\*, 840\*, 850, 890, 892-894, 895, 950. \*Also complete AO 120 or AO 121 for patent, trademark or copyright cases
- X III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.
- \_\_\_ IV. 220, 422, 423, 430, 440, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.
- \_\_\_ V. 150, 152, 153.
3. TITLE AND NUMBER, IF ANY, OF RELATED CASES. (SEE LOCAL RULE 40.1(E)).
4. HAS A PRIOR ACTION BETWEEN THE SAME PARTIES AND BASED ON THE SAME CLAIM EVER BEEN FILED IN THIS COURT? YES ☐ NO ☒
5. DOES THE COMPLAINT IN THIS CASE QUESTION THE CONSTITUTIONALITY OF AN ACT OF CONGRESS AFFECTING THE PUBLIC INTEREST? (SEE 28 USC 2403) YES ☐ NO ☒  
IF SO, IS THE U.S.A. OR AN OFFICER, AGENT OR EMPLOYEE OF THE U.S. A PARTY? YES ☐ NO ☒
6. IS THIS CASE REQUIRED TO BE HEARD AND DETERMINED BY A DISTRICT COURT OF THREE JUDGES PURSUANT TO TITLE 28 USC 2284? YES ☐ NO ☒
7. DO ALL PARTIES IN THIS ACTION RESIDE IN THE CENTRAL SECTION OF THE DISTRICT OF MASSACHUSETTS (WORCESTER COUNTY) - (SEE LOCAL RULE 40.1(C)). YES ☐ NO ☒  
OR IN THE WESTERN SECTION (BERKSHIRE, FRANKLIN, HAMPDEN OR HAMPSHIRE COUNTIES)? - (SEE LOCAL RULE 40.1(D)). YES ☐ NO ☒
8. DO ALL OF THE PARTIES RESIDING IN MASSACHUSETTS RESIDE IN THE CENTRAL AND/OR WESTERN SECTIONS OF THE DISTRICT? YES ☐ NO ☒  
(a) IF YES, IN WHICH SECTION DOES THE PLAINTIFF RESIDE? \_\_\_\_\_
9. IN WHICH SECTION DO ONLY PARTIES RESIDING IN MASSACHUSETTS RESIDE? Eastern
10. IF ANY OF THE PARTIES ARE THE UNITED STATES, COMMONWEALTH OF MASSACHUSETTS, OR ANY GOVERNMENTAL AGENCY OF THE U.S.A. OR THE COMMONWEALTH, DO ALL OTHER PARTIES RESIDE IN THE CENTRAL SECTION? YES ☐ NO ☐ OR WESTERN SECTION; YES ☐ NO ☐

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Kenneth M. ChiarelloADDRESS Clinton & Muzyka, P.C., One Washington Mall, Suite 1400, Boston, MA 02108TELEPHONE NO. 617-723-9165

(Category rev - 3/97)

## CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

OneBeacon America Insurance Company

## DEFENDANTS

Blue Water Enterprises, Inc.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Suffolk  
(EXCEPT IN U.S. PLAINTIFF CASES)COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Plymouth  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

## (c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Kenneth M. Chiarello (639274)  
CLINTON & MUZYKA, P.C.  
One Washington Mall, Suite 1400  
Boston, MA 02108 (617) 723-9165

## ATTORNEYS (IF KNOWN)

Michael P. Mason  
MASON & DUFFY, P.C.  
72 Sharp Street  
Hingham, MA 02043 (781) 337-0066

## II. BASIS OF JURISDICTION

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- |   | PTF                                   | DEF                                   |   | PTF                        | DEF                        |
|---|---------------------------------------|---------------------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input type="checkbox"/> 2            | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3            | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input checked="" type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 163 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 188 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 318 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 348 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury — Med. Malpractice <input type="checkbox"/> 365 Personal Injury — Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 159 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 620 Copyrights <input type="checkbox"/> 630 Patent <input type="checkbox"/> 640 Trademark <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 750 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 460 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 610 Selective Service <input type="checkbox"/> 650 Securities/Commodities/Exchange <input type="checkbox"/> 675 Customer Challenge 12 USC 3410 <input type="checkbox"/> 691 Agricultural Acts <input type="checkbox"/> 692 Economic Stabilization Act <input type="checkbox"/> 693 Environmental Matters <input type="checkbox"/> 694 Energy Allocation Act <input type="checkbox"/> 695 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 690 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 280 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>HABEAS CORPUS:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 750 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 661 HIA (1395ff) <input type="checkbox"/> 662 Black Lung (923) <input type="checkbox"/> 663 DIWC/DIWW (405(g)) <input type="checkbox"/> 664 SSID Title XVI <input type="checkbox"/> 665 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 670 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 671 IRS — Third Party 26 USC 7609	

## V. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- Transferred from
- ☐ 5 another district (specify)
- ☐ 6 Multidistrict Litigation
- Appeal to District Judge from
- ☐ 7 Magistrate Judgment

## VI. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE.)

This controversy arises out of a marine insurance contract and falls within this Court's jurisdiction pursuant to 28 U.S.C. 1333. The plaintiff is requesting that this Court appoint an Umpire pursuant to the Federal Arbitration Act (9 U.S.C. 5) and the terms and conditions of the marine insurance contract, for the purpose of determining the nature and extent of damages sustained by the defendant's vessel.

## VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION  
☐ UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☐ NOVIII. RELATED CASE(S) (See instructions):  
IF ANY

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_